NO. 82-1330

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

MORRIS THIGPEN, ET AL.,
Petitioners,

vs.

BARRY JOE ROBERTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in Illinois v. Vitale, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S. Ct. 2260 (1980) and under the Fifth and Fourteenth Amendments of the United States Constitution.

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Respondent asks that a writ of certiorari not be issued to review the opinion of the United States Court of Appeal for the Fifth Circuit entered in this case on November 16, 1982.

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the appendix of the Petition for the Writ herein at page A1 to page A6. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, is set out in the Appendix of the Petition for the writ herein, at page A7.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982, (Petitioner's Appendix-Page A7). The Jurisdiction of this Court rests on 28 USC §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The Respondent sets forth the same Statement of the Case as is set forth in the Petition for the writ herein.

REASONS FOR NOT GRANTING THE WRIT

Certiorari should not be granted in this case because the opinion of the United States Court of Appeals for the Fifth Circuit properly applied the correct standard of Review under Illinois v. Vitale, 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. (1980).

ARGUMENT

The Court of Appeals Applied the Correct Standard of Review When It Held That Roberts Has a Substantial Double Jeopardy Claim Under the United States Supreme Court's Holding in Illinois v. Vitale, 447 U.S. 410, 65L. Ed. 2d 228 100 S. Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

> "It is thus apparent that manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that conduct of Petitioner that constituted reckless driving -- losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicle -- is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction." [Emphasis Added] (Petitioners' A-3).

In objecting to the Magistrate's Report and Recommendation, the Petitioners' stated:

> "Section 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this State and do not involve a worngful homicide, an element altogether lacking in the traffic offenses." (Petitioners' Brief, P.5).

Here, the Petitioners appear to be saying that the Respondent could have been convicted of manslaughter by culpable negligence without introducing and relying upon the conduct of the Respondeint in the operation of his venicle before the accident. In short, the Petitioners are arguing that the "traffic offenses" were not used by the State in the prosecution to establish the criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, necessary for an involuntary manslaughter conviction

with a motor vehicle in Mississippi as was set out in Phillpis v. State, 379 So.. 2d 318, 320 (Miss. 1980).

> "The Defendant, BARRY JOE ROBERTS, has been charged by an Indictment with the crime of manslaughter for having by culpable negligence caused the death of BRENDA BONNER. If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonalbe hypothesis, consistent with innocence, that (a) the deceased, BRENDA BONNER, was a living person; and (b) that she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the deceased was a passenger, with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter. If the State has failed to prove any one or more of these elements, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, find the Defendant guilty". (Petitioners' A-12, A-13).

The State further by State's Instruction Number "2" clearly spelled out what the State considered "culpable negligence." That Instruction stated:

> "Culpable negligence is, as used in these instructions, is conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the act under surrounding circumstances as to render his conduct tantamount to wilfulness." (Petitioners' A-13).

These two jury instructions clearly and unequivocally support the finding of the Magistrate. One of the misdemeanors of which Petitioner was convicted was reckless driving which is set out in Section 63-3-1301 of the Mississippi Code. It provides that:

> "...That any person who drives any vehicle in such a manner as to indicate a wilful or wantom disregard for safety of persons or property is guilty of reckless driving."

In considering the Mississippi manslaughter statute, the District Court found that:

> Manslaughter is defined in general terms by Miss. Code Ann. Section 97-3-47 as "Killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law..."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involvuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, Smith v. Smith, 20 So. 2d 701, 704 (Miss. 1945), 'that is to say, in a wanton and flagrant disregard, automobile in violation of Section 63-3-121, and that the conduct of Petitioner that constituted reckless driving -- losing control of his vehicle while driving colliding with the other vehicle -- is the same neccessary for the manslaughter conviction...". [Mag. rpt. and rec., P. 3]. (Petitioner's A-11).

It is therefore urged that the conviction of the Respondent was based upon conduct for which he was tried upon as misdemeanors and which conduct was necessary as elements in the charge of manslaughter by automobile.

Three major cases raised by the Petitioners in support of their objections were Bacon v. Sullivan, 200 F. 2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910 73 S. Ct. 651, 97 L.Ed. 1345 (1953); Cutshall v. State, 191 M. 765, 4 so. 2d 289 (Miss. 1941) and State v. Stewart, 223 N.W. 2d 250 (1974), cert. denied, 423 U.S. 902, 96 S. Ct. 205, 46 L.Ed. 2d 134. In Bacon v. Sullivan, Supra, the Court analyzed the double jeopardy clause by indicating that the same act may constitute an offense against two seperate statutes if additional elements of proof are required for conviction on the latter count. In the Magistrates Report, it was clearly indicated that the Mississippi Supreme Court has construed that manslauthter by automobile requires:"... criminal negligence, which must be wanton or reckless under circumstances implying danger to human life or limb...", id. at A-11. The Respondent strongly urges that the analysis in Bacon v. Sullivan, Supra, is totally different from the elements of proof required in Respondent's case in that as Respondent previously pointed out that the State's In-

struction included all of the misdemeanor convictions as elements. It states in part:

> "...b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety or human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended and striking a vehicle in which the deceased was a passenger with the vehicle operated by Defendant then you shall find the Defendant guilty of manslaughter..." (Petitioners' A-12., A-13)

The State's Instruction continued:

> "If the State has failed to prove any one or more of these elements beyond a reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty." (Petitioners' A-12, A-13).

It is thus, again urged that in the instant case, manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that the conduct of Respondent that constituted reckless driving -- losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle -- is the same conduct that constituted the culpable negligence necessarry for the manslaughter conviction.

In a second case raised by the Petitioners, Cutshall v. State, Supra, the case involved only one similar factual situation which was that the driver was driving under the influence of intoxicating liquor. This case clearly has a different factual basis from the instant case which used the misdemeanor conduct to establish the culpable negligence necessary for the manslaughter conviction. The Court in that case further held that "... one may violate the law and yet not be culpable negligent in fact." This is a clear indication that in the instant case, as the State indicated in its Instructions to the Jury, other

elements of negligence and recklessness were necessary to prove culpable negligence. The Respondent urges that the Magistrate's findings that the conduct covered by the Misdemeanor charges was the same as that used to establish the culpable negligence necessary to establish a manslaughter conviction in he instant case is a correct statement of the law.

A third case raised by the Petitioners, State v. Stewart, Supra, is totally different as to its factual and legal basis. The Iowa case cite is based upon law in the State of Iowa which has no vehicular homicide statute. (Stewart, Supra.) . Becuase Iowa has no statute covering this offense, it is urged that the findings in that case which rambled through cases and statements from Am. Ju. 2d and C.J.S. can be clearly distinquished from the instant case which has a statutory basis and a Judicial veneer requiring a showing of a culpable negligence which argument was adequately dealt with by the Magistrate in his Report and Recommendations. (Petitioners' A-1, A-2, A-3, A-4).

In attempting to discredit the Magistrate's Report and Recommendations, the Petitioners tried to create the impression the Magistrate based his complete findings upon Illinois v. Vitale. 447 U.S. 410. 65L.Ed. 2d 228. 100 S. Ct. 2260 (1980). The Respondent directs the Court's attention to the Magistrate's comments in his Report and Recommendations at "A-2" wherein he states that "Guidance on this contention is found in Illinois v. Vitale,..." [Emphasis added]. In the Vitale case, Supra.. there was a mere possibility that the State would rely on the ingredients included in the traffic offenses, whereas in the instant case, if the State had failed to prove any one or more of these elements, according to its own Instruction (S-1), the Petitoner would have been found not guilty. In the instant case, the traffic ingredients

were necessary to establish culpable negligence and therefore, a conviction.

The further issues raised by Respondents in State v. James, 606 p. 2d 11101 (N.M. App. 1979) and State v. Tanton, 88 N.M. 333,337, 540, p. 2d 813, 817 (1875) involving jurisdictional matters are irrelevant to the matters and issues raised in the instant case since no jurisdictional matters were ever raised by the Respondent.

None of the cases raised by the Respondents in their Brief relate to legal decisions and issues involving involuntary manslaughter with a motor vehicle requiring by statute or judicial veneer, a showing of culpable negligence to sustain a conviction.

Additionally, prosecution of the Respondent on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. Blackledge v. Perry, 417 U.S. 21, 40 L.Ed 2d 628 (1974), which established a per se rule that a criminal defendant's right to due process is violated by the State substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant exercised his right under state law to appeal and to trial de nova. The facts of this case fall squarely within Blackledge, under which Respondent is also entitled to relief.

CONCLUSION

The petition for Certiorari should not be granted.

Respectfully submitted,

Cleve McDowell

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CERTIFICATE OF SERVICE

I, **CLEVE MCDOWELL**, attorney for Respondent, do hereby certify that I have this day served a true and correct copy of the foregoing Brief in Opposition to the Writ of Certiorari to the following counsel:

Bill Allain, Attorney General
State of Mississippi

P. Roger Googe, Jr.
Counsel of Record
Assistant Attorney General

Larry M. Wilson
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Attorneys for Petitioners

This, the 26th day of April, 1983.

Cleve McDowell

CLEVE MCDOWELL

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPER'S

Comes now, BARRY JOE ROBERTS, Respondent herein, and moves this Court for leave to proceed in forma pauper's and in support of said Motion, would show unto the Court as follows:

1. That the Respondent is unable to hire an attorney or pay the costs herein, to defend said action;

2. That the Respondent is unemployed.

Respectfully Submitted,

BARRY JOE ROBERTS

By: Cleve McDowell
CLEVE MCDOWELL
Attorney for Respondent

Cleve McDowell
Attorney at Law
P.O. Box 1205
Cleveland, MS 38732
(601) 846-7052

FORMA PAUPERIS AFFIDAVIT

I, hereby apply for leave to proceed herein without prepayment of fees or costs or giving security therefor. In support of my application, I state under oath that the following facts are true:

1. I am the Respondent in said matter and I believe that I am entitled to redress.
2. I am unable to prepay the costs of said action, or give security therefor.
3. I have no assets or funds which could be used to prepay the fees or costs.
4. I am unemployed.

Barry Joe Roberts
BARRY JOE ROBERTS

Subscribed and sworn to before me this 26th day of April, 1983.

Jeanette Hardwell
Notary Public

My Commission Expires:

4/9/84

CERTIFICATE OF SERVICE

I, CLEVE MCDOWELL, attorney for Respondent, do hereby certify that I have this day served a true and correct copy of the foregoing Motion For Leave to Proceed In Forma Pauper's to the following counsel:

Bill Allain, Attorney General
State of Mississippi

P. Roger Googe, Jr.
Counsel of Record
Assistant Attorney General

Larry M. Wilson
Special Assistant Attorney General
P.O. Box 220
Jackson, MS 39205

This, the 26th day of April, A.D., 1983.

Cleve McDowell

CLEVE MCDOWELL